U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7707471

Date: MAR. 5, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a molecular diagnostics company, seeks to classify the Beneficiary as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director denied the petition, concluding that while the Beneficiary met four of the initial evidentiary criteria, the record did not establish that she has sustained national or international acclaim and is one of the small percentage at the very top of her field of endeavor. On appeal, we withdrew the previous findings regarding two of the criteria granted by the Director, and thus did not conduct a final merits analysis of the Beneficiary's acclaim and standing in her field. The Petitioner now asserts in its motion to reconsider that we did not properly consider all of the evidence in the record.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the appeal.

I. LAW

The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

The Petitioner currently employs the Beneficiary as an in vitro diagnostic (IVD) assay development senior scientist. We note that on appeal, the Petitioner indicated that her field of expertise is molecular diagnostics, not molecular and cellular embryology as initially indicated.

We will first consider the Petitioner's arguments concerning the Beneficiary's salary and whether it can be considered as "high" under the criterion at 8 C.F.R. § 204.5(h)(3)(ix). In its motion brief, the Petitioner asserts that we disregarded the expert opinion letter from [redacted], an associate professor at the University of [redacted] compares the Beneficiary's annual salary of $108,000, as verified by her 2017 Form W-2, to the median wage for cellular and molecular biologists as found in the O*Net online database, which he states to be $76,690. However, his comparison does not take into account local variances in salary, relying upon the less accurate national median rather than local wage data for the area in which the Beneficiary is employed. In addition, a comparison to the median salary alone does not provide a complete set of information to which the Beneficiary's salary may be compared. Therefore, the professor's letter does not establish that the Beneficiary's salary can be considered to be high in relation to similarly situated scientists in her field.[1]

The Petitioner further asserts that we erred in comparing the Beneficiary's salary to the senior scientist wages from the SalaryList website which it submitted in its initial filing, arguing that it provided the "most relevant data" for the molecular and cellular biologist position as described above. However, the Petitioner did not distinguish between the different salary survey evidence when it was initially submitted, nor does it explain how we erred in considering all of the evidence in the record. While we agree with the Petitioner's argument that it need not establish that the Beneficiary's wages are the highest for her position, and that the SalaryList data it submitted as evidence is not as relevant as the O*Net data as it is specific neither to field nor location, this evidence at the least suggests that the Beneficiary's salary is not high relative to that of others in her field. We further note that the wage data from the Foreign Labor Certification Data Center (FLCDC) for biological scientists in the [redacted] area, which was also submitted by the Petitioner and put the prevailing wage for "Level 4" or fully competent employees at $92,955 per year, also indicates that the Beneficiary's salary is above average but not high as required by the regulation.[2]

In its motion brief, the Petitioner also addresses our decision to withdraw the Director's previous finding regarding the Beneficiary's original scientific contributions of major significance per 8 C.F.R. § 204.5(h)(3)(v). It notes that in our previous decision, we indicated that because evidence in the form of independent clinical studies, press releases and promotional material from the Beneficiary's former employer, [redacted] had been used to establish her critical role for that company under a different evidentiary criteria, we would not consider it in support of her claim to the contributions criterion. The Petitioner asserts that "It is illogical to prohibit evidence from establishing two different criteria when there is significant overlap between EB-1criteria in a business context."

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[1] *See* USCIS Policy Memorandum PM 602-0005.1, *Evaluation of Evidence Submitted With Certain I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14.* at 11 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html, noting that it the petitioner's burden to provide geographical and position-appropriate evidence to establish that a salary is relatively high. We further note that that data is available from the same website from which [redacted] obtained his data.

[2] We note that unlike the O*Net data referenced by [redacted], the FLCDC data provides a broader range of salaries at different skill levels, and thus a more accurate basis for comparison.

Upon review, we agree with the Petitioner that evidence may be considered in support of more than one criterion under 8 C.F.R. § 204.5(h)(3)(i)-(x).[3] The marketing evidence referred to shows that the product which the Beneficiary contributed to developing, the [redacted] Panel, is an important product for the company, and the independent studies submitted verify its value in clinical testing. However, as we noted in our previous decision, although the Beneficiary's contribution has undoubtedly made a financial impact for her former employer, the evidence does not establish an impact on the overall field of molecular diagnostics.

The Petitioner asserts on motion that we "should not have required evidence of other companies using [the Beneficiary's] contributions to establish an "impact" in the field." Although we noted that a letter from [redacted] senior director for research and development at [redacted] included a claim of "wide implementation" of the [redacted] Panel on which she did not elaborate, we did not require evidence of other companies' use of the product. We found that the Petitioner did not establish that the Beneficiary's work had an impact beyond her former employer, and thus that her contribution was of major significance to the broader field of molecular diagnostics, but we did not require specific evidence or utilize novel evidentiary requirements as the Petitioner suggests.[4]

The Petitioner also asserts that in our previous decision, we disregarded evidence of the Beneficiary's work while at the University [redacted], which led to a patent that was licensed to a Canadian company that develops [redacted] diagnostic devices. It argues that the licensing of this technology is sufficient to demonstrate its major significance, and that confidential sales figures should not be required. Upon review, our previous decision did not improperly dictate the type of evidence required to establish the major significance of the Beneficiary's original contribution, and we note that it included extensive analysis of the evidence submitted in relation to this work. For instance, we noted that in his letter, [redacted] speculated on the potential influence of the Petitioner's [redacted] method, stating that it could assist in the more rapid and accurate diagnosis of [redacted], but did not state that such an impact to the field had already occurred. We also note that the letter from [redacted] Vice President of Research & Development for [redacted], the company to which the patent was licensed, writes in his letter that "this technology is an important lever to [redacted]" and that it "contributes to making [redacted] extremely competitive in the field of [redacted]" but similarly does not suggest or provide information to support a finding that the introduction of this technology has been of major significance in the wider field of molecular diagnostics.

Since the Petitioner has not established that our decision to reverse the Director regarding the criteria at 8 C.F.R. § 204.5(h)(3)(v) and (ix) was incorrect, it has only satisfied the requirements of two of the requisite three evidentiary criteria. We therefore need not conduct a final merits determination to consider whether the Beneficiary has sustained national or international acclaim or is one of the small percentage at the top of her field.

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[3] *See* USCIS Policy Memorandum PM 602-0005.1, *Evaluation of Evidence Submitted With Certain I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14.* at 6 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

[4] USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *See Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008).

III. CONCLUSION

For all of the reasons stated above, the Petitioner has not established that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision.

ORDER: The motion to reconsider is dismissed.